

UNITED STATES INTERNATIONAL TRADE COMMISSION

FOUNDRY COKE FROM CHINA
Investigation No. 731-TA-891 (Preliminary)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3365, November 2000)

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DETERMINATION

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. § 1673b(a)), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from China of foundry coke, provided for in heading 2704.00.00 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigation. The Commission will issue a final phase notice of scheduling which will be published in the *Federal Register* as provided in section 207.21 of the Commission's rules upon notice from the Department of Commerce (Commerce) of an affirmative preliminary determination in the investigation under section 733(b) of the Act, or, if the preliminary determination is negative, upon notice of an affirmative final determination in that investigation under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigation need not enter a separate appearance for the final phase of the investigation. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation.

BACKGROUND

On September 20, 2000, a petition was filed with the Commission and the Department of Commerce by ABC Coke, Birmingham, AL; Citizens Gas and Coke, Indianapolis, IN; Erie Coke, Erie, PA; Tonawanda Coke, Tonawanda, NY; and the United Steelworkers of America, AFL-CIO, alleging that an industry in the United States is materially injured and threatened with material injury by reason of LTFV imports of foundry coke from China. Accordingly, effective September 20, 2000, the Commission instituted antidumping duty investigation No. 731-TA-891 (Preliminary).

Notice of the institution of the Commission's investigation and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of September 27, 2000 (65 FR 58103). The conference was held in Washington, DC, on October 11, 2000, and all persons who requested the opportunity were permitted to appear in person or by counsel.

¹ The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

VIEWS OF THE COMMISSION

Based on the record in this investigation, we find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of foundry coke from China that are allegedly sold in the United States at less than fair value (“LTFV”).

I. THE LEGAL STANDARD FOR PRELIMINARY DETERMINATIONS

The legal standard for preliminary antidumping duty determinations requires the Commission to determine, based upon the information available at the time of the preliminary determination, whether there is a reasonable indication that a domestic industry is materially injured, threatened with material injury, or whether the establishment of an industry is materially retarded, by reason of the allegedly unfairly traded imports.¹ In applying this standard, the Commission weighs the evidence before it and determines whether “(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.”²

II. DOMESTIC LIKE PRODUCT AND INDUSTRY

A. In General

To determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the “domestic like product” and the “industry.”³ Section 771(4)(A) of the Tariff Act of 1930, as amended (“the Act”), defines the relevant domestic industry as the “producers as a [w]hole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”⁴ In turn, the Act defines “domestic like product” as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation”⁵

The decision regarding the appropriate domestic like product(s) in an investigation is a factual determination, and the Commission has applied the statutory standard of “like” or “most similar in characteristics and uses” on a case-by-case basis.⁶ No single factor is dispositive, and the Commission

¹ 19 U.S.C. § 1673b(a); *see also* American Lamb Co. v. United States, 785 F.2d 994, 1001-1004 (Fed. Cir. 1986); Aristech Chemical Corp. v. United States, 20 CIT 353, 354 (1996).

² American Lamb, 785 F.2d at 1001 (Fed. Cir. 1986); *see also* Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1543 (Fed. Cir. 1994).

³ 19 U.S.C. § 1677(4)(A).

⁴ 19 U.S.C. § 1677(4)(A).

⁵ 19 U.S.C. § 1677(10).

⁶ *See, e.g.,* Acciai Speciali Terni S.p.A. v. United States, No. 00-125, Slip Op. at 3-4, 28 (Ct. Int’l Trade Oct. 2, 2000); Allegheny Ludlum Corp. v. United States, No. 00-109, Slip Op. at 9-10 (Ct. Int’l Trade Aug. 28, 2000); NEC Corp. v. Dep’t of Commerce, 36 F. Supp. 2d 380, 383 (Ct. Int’l Trade 1998); Nippon Steel Corp. v. United States, 19 CIT 450, 455 (1995); Torrington Co. v. United States, 747 F. Supp. 744, 749, n.3 (Ct. Int’l Trade 1990) *aff’d*, 938 F.2d 1278 (Fed. Cir. 1991) (“every like product determination ‘must be made on the particular record at issue’ and the ‘unique facts of each case’”). The Commission generally considers a number of factors including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) common manufacturing facilities, production processes and production employees; and, where appropriate, (6) price. *See* Nippon Steel, 19 CIT at 455, n.4; Timken Co. v. United States, 913 F.

may consider other factors it deems relevant based on the facts of a particular investigation.⁷ The Commission looks for clear dividing lines among possible like products and disregards minor variations.⁸ Although the Commission must accept the determination of the Department of Commerce (“Commerce”) as to the scope of the imported merchandise allegedly subsidized or sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified.⁹

B. Product Description

In its notice of initiation, Commerce defined the imported merchandise within the scope of this investigation as follows:

coke larger than 100 mm (4 inches) in maximum diameter and at least 50 percent of which is retained on a 100-mm (4 inch) sieve, of a kind used in foundries. The foundry coke products subject to this investigation are currently classifiable under subheading 2704.00.00.10 of the Harmonized Tariff Schedules of the United States (HTSUS).¹⁰

Foundry coke is the carbonized product remaining after blended bituminous coals are heated in an oven for a period of time.¹¹ It is one of three types of metallurgical coke,¹² and accounts for 5 to 7 percent of annual U.S. metallurgical coke production. Foundry coke is used primarily in the production of molten iron in a cupola furnace,¹³ both as a fuel and a source of carbon for the melted product.¹⁴

⁶ (...continued)
Supp. 580, 584 (Ct. Int’l Trade 1996).

⁷ See, e.g., S. Rep. No. 96-249, at 90-91 (1979).

⁸ Nippon Steel, 19 CIT at 455; Torrington, 747 F. Supp. at 748-49. See also S. Rep. No. 96-249, at 90-91 (1979) (Congress has indicated that the like product standard should not be interpreted in “such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to the conclusion that the product and article are not ‘like’ each other, nor should the definition of ‘like product’ be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under consideration.”).

⁹ Hosiden Corp. v. Advanced Display Mfrs., 85 F.3d 1561, 1568 (Fed. Cir. 1996) (Commission may find a single like product corresponding to several different classes or kinds defined by Commerce); Torrington, 747 F. Supp. at 748-752 (affirming Commission determination of six like products in investigations where Commerce found five classes or kinds).

¹⁰ 65 Fed. Reg. 58103 (Oct. 17, 2000). Although the HTSUS subheadings are provided for convenience and Customs purposes, Commerce noted that its written description of the scope of this investigation is dispositive. *Id.*

¹¹ Confidential Report, Memorandum INV-X-228 (Oct. 30, 2000) (“CR”) at I-2, Public Report, (“PR”) at I-2. See also Foundry Coke: A Review of the Industries in the United States and China, Inv. No. 332-407, USITC Pub. 3323 at I-1 (July 2000) (“Section 332 Report”).

¹² “Metallurgical coke” is the carbonized product remaining after the destructive distillation of certain types of coal are heated in an oven for many days or hours. Section 332 Report at I-2. The types of metallurgical coke other than foundry coke are blast furnace coke (or “furnace coke”) and other industrial coke, including coke breeze. CR at I-2, Section 332 Report at I-1.

¹³ A “cupola furnace” is a cylindrically-shaped continuous melting device that is charged in alternating layers of metal (e.g., scrap iron) and replacement fuel (e.g., foundry coke). Section 332 Report at E-2.

¹⁴ CR at I-2, PR at I-2 ; Section 332 Report at I-1.

C. Domestic Like Product Issues

Petitioners contend that the Commission should find a single domestic like product consisting only of foundry coke.¹⁵ For the purposes of the preliminary phase of this investigation, respondents do not challenge the domestic like product definition proposed by petitioners.¹⁶ However, they argue that expansion of the like product to include blast furnace coke and industrial coke would make the evidence for a negative determination “even more compelling.”¹⁷ Based on the record developed in the preliminary phase of this investigation, we determine that there is a single domestic like product comprised only of foundry coke.

1. Whether blast furnace coke should be included in the domestic like product

Foundry coke and blast furnace coke share some similar physical characteristics, and both are types of metallurgical coke.¹⁸ However, the two types of coke are distinguishable in other physical aspects, including size,¹⁹ coal composition,²⁰ ash content, and uniformity and screening requirements.²¹ The differences in physical characteristics largely reflect the differences in end uses. Foundry coke is used primarily in the production of molten iron in cupola furnaces. The molten iron is then used to make various cast products such as automotive engines.²² In light of its end uses, foundry coke must have good strength, low ash content, and uniform shape and size.²³ Blast furnace coke is used in an iron-making blast furnace for the production of steel.²⁴ It must be a very stable product in order to withstand abrasion and breakage during handling and use in the blast furnace.²⁵ Industry literature indicates that there is limited interchangeability between foundry coke and blast furnace coke, in that the latter is used only in the production of steel and cannot be used in foundry cupolas because of its smaller size.²⁶ One domestic foundry coke producer stated that customers will refuse to take “very many {pieces} below foundry size.”²⁷

Blast furnace coke, which accounts for approximately 90 percent of annual U.S. coke production, is primarily produced captively by U.S. steel producers, and therefore distributed through internal

¹⁵ Petitioners’ Postconference Brief at 3-5; Transcript of Conference, Oct. 11, 2000 (“Conference Tr.”) at 16-17.

¹⁶ Respondents’ Postconference Brief at Q-6, n. 16.

¹⁷ Respondents’ Postconference Brief at Q-6.

¹⁸ CR at I-2, PR at I-2.

¹⁹ Foundry coke is relatively large, at four or more inches in diameter, and needs to be of uniform shape or size. CR at I-2, I-4, PR at I-1, I-4; Section 332 Report at I-2-3. By comparison, blast furnace coke is one to three inches in diameter, and does not need to be of a uniform shape or size. CR at I-2, I-4, PR at I-2, I-4.

²⁰ Foundry coke is made from a blend of coals, whereas furnace coke is not. CR at I-4, *citing* Conference Tr. at 16 and 54.

²¹ Foundry coke sizes are generally 6x9, 5x9, 5x10, 4x9, 4x6, or some variation of these measurements. Conference Tr. at 68. Unlike foundry coke, blast furnace coke does not require screening. CR at I-2, PR at I-1. *See* Conference Tr. at 68-69.

²² CR at I-2, PR at I-2.

²³ CR at I-2, PR at I-2.

²⁴ CR at I-2, PR at I-2.

²⁵ Section 332 Report at I-2.

²⁶ CR at I-5, PR at I-4.

²⁷ Conference Tr. at 70.

transfers.²⁸ In contrast, more than *** percent of domestic foundry coke producers' 1999 shipments were sold on the open market.²⁹

For the most part, foundry coke and blast furnace coke are produced by different producers, but there is some overlap. As stated above, most domestic blast furnace coke is produced internally by steel producers, whereas foundry coke is produced predominantly by the six foundry coke producers. However, three foundry coke producers make some blast furnace coke in addition to foundry coke.³⁰ Although it is technologically possible for U.S. foundry coke producers to produce larger quantities of blast furnace coke, the Clean Air Act restricts the amount of blast furnace coke that they can produce.³¹

The foundry coke producers who also make blast furnace coke use some common equipment for the two types of coke production, but production equipment as well as the cycling time for each type of coke may differ.³² *** use the same ovens to make both types of coke; however, they use different coals, higher temperatures, and a shorter cycling time for blast furnace coke.³³ In addition, *** uses a different *** for its blast furnace coke.³⁴ *** produces the two products in separate ovens.³⁵

The domestic producers view foundry coke and blast furnace coke as separate products.³⁶ In general, blast furnace coke is sold to steel manufacturers whereas foundry coke is sold to foundries.³⁷ Because the end users for each product are different, it follows that these customers, as well as the producers, perceive the two types of coke as different products. Reflecting the differences in coal input, ash content, cycling times, and quality controls, foundry coke commands a higher price than blast furnace coke.³⁸

In sum, the record indicates that foundry coke and blast furnace coke are produced from different types of coal and are made with specific size differences that control their end uses. They are sold at different prices almost entirely to different groups of end users for use in the production of different end products. Although some foundry coke producers make both types of coke, the two types of coke generally are produced by different producers, and most foundry coke is sold on the open market whereas most blast furnace coke is internally consumed. Based on these considerations, we conclude that blast furnace coke is not part of the domestic like product.³⁹

2. Whether industrial coke should be included in the domestic like product

²⁸ Section 332 Report at I-5-6; Conference Tr. at 16, 56. Although there were no industry-wide data collected for blast furnace coke, petitioners estimate that at least 80 percent of domestically-produced blast furnace coke is captively consumed by steel mills. Conference Tr. at 56.

²⁹ See CR and PR at Table III-2.

³⁰ CR at I-4, n.12, PR at I-3, n.12.

³¹ Conference Tr. at 47-48, 72, 75-76.

³² CR at I-4-5 & n.12, PR at I-3-4 & n.12.

³³ CR at I-2, I-4, n.12, PR at I-2, I-3, n.12. Foundry coke is cycled on an oven by oven basis at about 28 hours, whereas the cycle for blast furnace coke is about 18 hours. Conference Tr. at 48.

³⁴ CR at I-5, PR at I-4.

³⁵ CR at I-4, n.12, PR at I-3, n.12.

³⁶ See, e.g., Conference Tr. at 72-73.

³⁷ CR at I-5, PR at I-4.

³⁸ CR at I-5, PR at I-4.

³⁹ Commissioner Askey notes that, in any final investigation, she intends to seek further information concerning whether blast furnace coke should be part of the domestic like product.

Industrial coke consists of those products remaining after the screening of foundry coke and blast furnace coke.⁴⁰ It includes products that are undersized or otherwise rejected for foundry or blast furnace use because of carbon or ash content.⁴¹ Since industrial coke is mainly a byproduct of foundry or blast furnace coke, it does not have unique chemical characteristics that distinguish it from other types of coke. The main physical distinction is its size. Industrial coke has different end uses from foundry coke (and from blast furnace coke). It is not used in foundries, and instead is used in the production of other products including rock wool, beet sugar, calcium carbide, and smelting iron.⁴²

While industrial coke, like foundry coke, is used as fuel, there is limited interchangeability between the two products. As noted in the preceding discussion, foundry cupolas generally cannot use non-foundry coke because of the smaller size of such alternative products.⁴³ While industrial users may technically be able to use foundry coke, they do not in fact use the two interchangeably because of cost prohibitions.⁴⁴ Industrial coke that is the byproduct of foundry coke is manufactured using the same processes, facilities, and employees as those used to produce foundry coke. Industrial coke that is the byproduct of blast furnace coke is predominantly produced by non-foundry coke producers, and may be subject to whatever production differences exist between foundry and blast furnace coke, as noted in the preceding discussion.

The evidence in the record suggests that foundry coke and industrial coke are both sold directly by the domestic producers to end users. However, domestic producers view foundry coke and industrial coke as separate products.⁴⁵ They sell foundry coke only to foundries, and industrial coke to other customers such as lead smelters and rock wool, sugar beet, and calcium carbide producers.⁴⁶ Because the end users for each product are different, it follows that these customers, as well as the producers, perceive the two types of coke as different products. According to domestic producers, industrial coke prices range from \$*** to \$*** per ton less than foundry coke.⁴⁷

In sum, industrial coke may be the byproduct of foundry coke that is manufactured at foundry coke facilities using the same lines, processes, and employees. However, the differences in size, and occasionally in ash and carbon content, create significant differences in the price, end uses, and customers for domestically-produced foundry coke and industrial coke. Based on these considerations, we conclude that industrial coke is not part of the domestic like product in the preliminary phase of this investigation.⁴⁸

3. Conclusion

⁴⁰ CR at I-2, PR at I-2; Section 332 Report at I-2, n.9.

⁴¹ CR at I-2, PR at I-2. Industrial coke also includes “coke breeze,” *i.e.*, the fine screenings from crushed coke used predominantly as a fuel source in the process of agglomerating iron. *Id.*

⁴² Section 332 Report at I-2, n. 9; Petitioners’ Postconference Brief at 4-5 and Exhibit 1.

⁴³ CR at I-5, I-6, PR at I-4-5.

⁴⁴ As a plant manager for industrial coke user USG testified: “[W]hat we’re looking for from the coke that we purchase is we’re using it strictly as a fuel. . . . [W]hen we do our purchasing we look at it strictly on a heat value basis for providing that. The reason our material falls outside of the foundry coke, and we don’t compete with the people buying the foundry coke, is because we literally could not afford in our process that high cost material.” Conference Tr. at 151.

⁴⁵ *See, e.g.*, Conference Tr. at 39, 58, 78-79.

⁴⁶ CR at I-6, PR at I-4-5; Petitioners’ Postconference Brief at 5 and Exhibit 1.

⁴⁷ Petitioners’ Postconference Brief at 5.

⁴⁸ Commissioner Askey notes that, in any final investigation, she intends to seek further information concerning whether industrial coke should be part of the domestic like product.

For the purposes of the preliminary phase of this investigation, we conclude that there is one domestic like product, consisting only of foundry coke.

D. Domestic Industry and Related Parties

1. Domestic Industry

The domestic industry is defined as “the producers as a [w]hole of a domestic like product.”⁴⁹ In defining the domestic industry, the Commission’s general practice has been to include in the industry all of the domestic production of the like product, whether toll-produced, captively consumed, or sold in the domestic merchant market.⁵⁰ Based on our finding that the domestic like product consists of foundry coke, we conclude that the domestic industry consists of all domestic producers of that product.

2. Related Parties

We must further determine whether any producer of the domestic like product should be excluded from the domestic industry pursuant to section 771(4)(B) of the Act. That provision of the statute allows the Commission, if appropriate circumstances exist, to exclude from the domestic industry producers that are related to an exporter or importer of subject merchandise or which are themselves importers.⁵¹ Exclusion of such a producer is within the Commission’s discretion based upon the facts presented in each case.⁵² In defining the domestic industry in this investigation, we have considered whether Empire Coke Co. (“Empire”) or Sloss Industries Corp. (“Sloss”) should be excluded from the domestic industry under the related parties provision.

a. Sloss Industries Corp.

⁴⁹ 19 U.S.C. § 1677(4)(A).

⁵⁰ See United States Steel Group v. United States, 873 F. Supp. 673, 681-84 (Ct. Int’l Trade 1994), *aff’d*, 96 F.3d 1352 (Fed. Cir. 1996).

⁵¹ 19 U.S.C. § 1677(4)(B).

⁵² Sandvik AB v. United States, 721 F. Supp. 1322, 1331-32 (Ct. Int’l Trade 1989), *aff’d without opinion*, 904 F.2d 46 (Fed. Cir. 1990); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (Ct. Int’l Trade 1987). The primary factors the Commission has examined in deciding whether appropriate circumstances exist to exclude the related parties include: (1) the percentage of domestic production attributable to the importing producer; (2) the reason the U.S. producer has decided to import the product subject to investigation, *i.e.*, whether the firm benefits from the LTFV sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market; and (3) the position of the related producers vis-a-vis the rest of the industry, *i.e.*, whether inclusion or exclusion of the related party will skew the data for the rest of the industry. See, *e.g.*, Torrington Co. v. United States, 790 F. Supp. 1161, 1168 (Ct. Int’l Trade 1992), *aff’d without opinion*, 991 F.2d 809 (Fed. Cir. 1993). The Commission has also considered the ratio of import shipments to U.S. production for related producers and whether the primary interests of the related producers lie in domestic production or in importation. See, *e.g.*, Melamine Institutional Dinnerware from China, Indonesia, and Taiwan, Invs. Nos. 731-TA-741-743 (Final), USITC Pub. 3016 (Feb. 1997) at 14, n.81.

Sloss is a wholly-owned subsidiary of Walter Foundries (“Walter”),⁵³ which apparently wholly owns a U.S. importer of subject foundry coke, ***.⁵⁴ In these circumstances, Walter directly controls Sloss as well as ***, and therefore Sloss is a related party under 19 U.S.C. § 1677(4)(B)(ii)(III).

*** imports of subject Chinese coke were equal to *** percent of Sloss’s foundry coke production in 1999.⁵⁵ Sloss does not itself import any subject coke, but does sell its domestically-produced coke to ***.⁵⁶ Thus, its affiliated importer, ***, both imports foundry coke directly from China and purchases domestic foundry coke from ***.⁵⁷

Sloss maintains separate financial records from those maintained by the corporate parent.⁵⁸ Although Sloss is performing ***, it is not clear whether Sloss is deriving a benefit from its relationship with ***. The record does not indicate the reasons for *** importation or the nature of the relationship between Sloss and ***.⁵⁹ Sloss accounted for *** percent of domestic foundry coke production in 1999, whereas *** accounted for *** percent.⁶⁰ Based on the information in the record, we do not find that there are appropriate circumstances to exclude Sloss from the domestic industry.

b. Empire Coke Co.

During the period of investigation, Empire ***.⁶¹ Since Empire is neither an importer of subject products nor related through corporate affiliation to such an importer, Empire is not *ipso facto* a “related party” under 19 U.S.C. § 1677(4)(B)(ii)(III). However, Empire may be deemed a related party if its purchases of imports are sufficient to amount to “control” of a large share of subject imports.⁶² In certain previous cases, the Commission has found such control to exist where the domestic producer was responsible for a predominant portion of an importer’s purchases and the importer’s purchases were substantial.⁶³

⁵³ CR at III-3, PR at III-2.

⁵⁴ See CR at IV-1, PR at IV-1.

⁵⁵ CR at III-3, PR at III-2.

⁵⁶ See CR at IV-1, PR at IV-1.

⁵⁷ See CR at IV-1, PR at IV-1.

⁵⁸ See CR and PR at Table VI-3.

⁵⁹ The data for Sloss and *** were taken (with permission) from the Section 332 investigation. Given the nature of that investigation, the Section 332 questionnaires did not elicit some of the pertinent information relevant to the related party question in this investigation.

⁶⁰ CR at III-1, PR at III-1.

⁶¹ CR at III-2, IV-2, n. 4, PR at III-2, IV-1, n. 4. Empire purchased imports from *** in 1999 and from *** in interim 2000. Empire is a wholly-owned subsidiary of McWane. CR at III-2, PR at III-2.

⁶² See Structural Steel Beams From Germany, Japan, Korea, and Spain, Invs. Nos. 701-TA-401 (Preliminary) and 731-TA-852-855 (Preliminary), USITC Pub. 3225 (Sept. 1999) at 8.

⁶³ See, e.g., Certain Cut-to-Length Steel Plate from the Czech Republic, France, India, Indonesia, Italy, Japan, Korea, and Macedonia, Invs. Nos. 701-TA-387-392 and 731-TA-815-822 (Preliminary), USITC Pub. 3181 at 12 (Apr. 1999); Certain Brake Drums and Rotors from China, Inv. No. 731-TA-744 (Final), USITC Pub. 3035 at 10 n.50 (Apr. 1997).

*** accounted for *** percent of subject imports in 1999,⁶⁴ and Empire's purchases accounted for *** percent of *** imports in 1999.⁶⁵ For the purposes of the preliminary phase of this investigation, we find these volumes sufficient to view Empire as a related party. However, we do not find appropriate circumstances to exclude Empire from the domestic industry.

While Empire's *** subject imports in 1999 were not insignificant,⁶⁶ the evidence in the record suggests that Empire's primary interests continue to lie in domestic production of foundry coke, and not in importation. The importer (***) from whom Empire ***, has since exited the market.⁶⁷ In addition, Empire's *** in proportion to Empire's foundry coke production, equaling *** percent of Empire's *** foundry coke production.⁶⁸

In its producers' questionnaire response, Empire indicated that it ***.⁶⁹ Thus, it appears that Empire's transactions concerning the subject imports may have been prompted by the needs of its related purchasers to stay competitive with their competitors who may have been purchasing and using Chinese coke.⁷⁰ Further, in its questionnaire response, Empire, a non-petitioning company, ***.⁷¹ Based on the information in the record, we find that appropriate circumstances do not exist to exclude Empire from the domestic industry.

III. CONDITIONS OF COMPETITION⁷²

Several conditions of competition are pertinent to our analysis in this investigation. First, environmental compliance costs represent a significant ongoing cost for the domestic foundry coke industry.⁷³ The industry has already spent over \$100 million in complying with environmental regulations, in particular the Clean Air Act of 1990, and there are further significant costs that domestic foundry coke producers will continue to incur in the future in order to stay environmentally compliant.

In addition, the record suggests that the industry may be capital intensive and that capital expenditures are likely to increase in the imminent future as maintenance and repair costs on aging

⁶⁴ CR at IV-2, PR at IV-1.

⁶⁵ CR at III-2, PR at III-2. *** did not return an importers' questionnaire, but Empire reported that *** imported *** metric tons of subject coke on Empire's behalf in 2000. CR at IV-1, n. 1, PR at IV-1, n. 1. As such, there is limited information in the current record to ascertain whether Empire's *** were sufficient to amount to "control" of a large share of subject imports.

⁶⁶ Empire's *** subject Chinese coke were equal to *** percent of Empire's foundry coke production in 1999. CR at III-2, PR at III-2.

⁶⁷ CR at IV-2, PR at IV-1.

⁶⁸ CR at IV-1, n. 1, PR at IV-1, n. 1; Empire's Producers' Questionnaire Response.

⁶⁹ Empire's Producers' Questionnaire Response at 6.

⁷⁰ The need for the purchasers of foundry coke to compete in their end markets with other manufacturers who are using Chinese coke, or with low-priced Chinese end product, was noted by two purchasers—one a pipe and fittings producer, and the other a producer of manhole covers. Conference Tr. at 42-43, 44-45.

⁷¹ For example, Empire indicated that *** and that it ***. Empire's Producers' Questionnaire Response at ***.

⁷² Imports from China accounted for all U.S. imports of foundry coke during the period of investigation. CR and PR at Table IV-1. Therefore, negligibility is not an issue in this investigation.

⁷³ Petition at 12-13; Conference Tr. at 17-18, 32, 35.

equipment increase.⁷⁴ High expenses associated with building and maintaining the production equipment as well as costs of complying with environmental requirements may indicate that the industry must maintain high capacity utilization rates to offset its costs.⁷⁵

Demand for foundry coke is derived from the demand for the end products produced by purchasers in the automotive and truck building sectors and the pipe and fittings sectors.^{76 77} From 1997 through 1999, apparent U.S. consumption of foundry coke increased by 8.5 percent.⁷⁸ However, apparent consumption was 3.3 percent lower during the first half of 2000 relative to the comparable period for 1999.⁷⁹ According to petitioners, 1999 marked the top of a business cycle that has begun to fall as the demand for foundry coke declines in response to declines in end use markets.⁸⁰

Domestic capacity utilization for foundry coke remained relatively steady at approximately 75 percent from 1997 through 1999 and during interim 1999.⁸¹ In interim 2000, capacity utilization dropped to 70 percent.⁸² Concurrent with the lower capacity utilization rates and decreased demand during interim 2000, U.S. producers' domestic shipments fell relative to interim 1999, while shipments of subject imports rose relative to interim 1999.⁸³ There were no nonsubject imports of foundry coke into the United States during the period of investigation.⁸⁴

The evidence obtained during the preliminary phase of this investigation indicates that price is the most important factor in the sale of foundry coke, although quality and availability are also important considerations in purchase decisions.⁸⁵ The current record lacks some pertinent information relevant to evaluating the degree to which the domestic product and subject imports are substitutable. However, the evidence in the current record suggests that at least some purchasers, particularly in the pipe and fittings sectors, view the Chinese product as substitutable for the domestic product.⁸⁶ Notwithstanding quality differences, these purchasers indicated that they are willing to test the Chinese product or that they had

⁷⁴ See, e.g., Conference Tr. at 18-19, 35, 65-67, 72-73.

⁷⁵ In any final investigation, we intend to explore further petitioners' assertions concerning the capital intensive nature of the industry and the need to maintain high capacity utilization rates.

⁷⁶ CR at II-3, PR at II-2; Conference Tr. at 26, 28; Section 332 Report at 2-4.

⁷⁷ We note as a condition of competition that two domestic producers—*** and ***—reported internal transfers of foundry coke to related pipe foundries in the United States. CR at III-4, PR at III-3. No party has argued for application of the statutory captive production provision, 19 U.S.C. § 1677(7)(C)(iv), and for the purposes of the preliminary phase of this investigation, we do not address the applicability of that provision. We note, however, that the proportionate share of internal transfers amounted only to *** percent of 1999 U.S. shipments by domestic producers. CR and PR at Table III-2.

⁷⁸ CR and PR at IV-3 and Tables IV-2, IV-3 and C-1.

⁷⁹ CR and PR at IV-3 and Tables IV-2, IV-3 and C-1.

⁸⁰ Conference Tr. at 17-18, 26, 30.

⁸¹ CR and PR at Table III-1.

⁸² CR and PR at Table III-1.

⁸³ CR and PR at Table IV-3.

⁸⁴ CR and PR at Table IV-3.

⁸⁵ CR at II-4, PR at II-3.

⁸⁶ See, e.g., CR at II-4, PR at II-3; Conference Tr. at 39-41, 42-43. In any final investigation, we intend to explore further the degree to which this is true across the various purchaser markets. For example, we intend to seek further information addressing substitutability for non-metallurgy uses, such as automotive parts.

already done so and found the Chinese product to be satisfactory for their uses, either alone or in combination with the domestic product.⁸⁷

Transportation costs are an important factor in the price of foundry coke because such costs are high relative to the value of the product.⁸⁸ U.S. producers report that transportation costs account for between *** percent of the total cost of foundry coke.⁸⁹ As a consequence of the high freight costs, sales tend to be concentrated within a geographically close range to each producer.⁹⁰

Most U.S. sales of foundry coke are on a contract basis, varying in duration from one to five years for domestic producers and from *** for importers.⁹¹ All responding domestic producers and importers reported that foundry coke prices are fixed in their contracts, and *** reported that quantities are also fixed.⁹² Notwithstanding the prevalence of fixed price contracts, all responding domestic producers, as well as ***, reported that their contracts contain meet-or-release provisions.⁹³ Domestic producers typically negotiate their contracts during the last quarter of the year, and are now in the process of negotiating contracts for 2001 with their customers.⁹⁴

IV. REASONABLE INDICATION OF THREAT OF MATERIAL INJURY BY REASON OF ALLEGEDLY LTFV IMPORTS

Section 771(7)(F) of the Act directs the Commission to determine whether the U.S. industry is threatened with material injury by reason of the subject imports by analyzing whether “further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted.”⁹⁵ The Commission may not make such a determination “on the basis of mere conjecture or supposition,”⁹⁶ and considers the threat factors “as a whole.” In making our determination, we have considered all factors that are relevant to this investigation.^{97 98 99} In considering the statutory threat factors, we have taken into account the current state

⁸⁷ Conference Tr. at 39-40, 44; CR at II-4, n. 9, PR at II-3, n. 9.

⁸⁸ CR at V-1, PR at V-1.

⁸⁹ CR at V-1, PR at V-1.

⁹⁰ CR at V-1-2, PR at V-1.

⁹¹ CR at V-3-4, PR at V-2. The record indicates that *** percent of reported sales by domestic producers were by contract, and *** percent of importers’ sales were by contract. *Id.*

⁹² CR at V-3, PR at V-2.

⁹³ In any final investigation, we intend to explore further the extent to which contracts contain meet-or-release clauses or similar provisions, and the extent to which such clauses are exercised. In addition, Commissioner Askey intends to request the parties to supply copies of the actual contracts containing such clauses.

⁹⁴ Conference Tr. at 30.

⁹⁵ 19 U.S.C. §§ 1673b(a) and 1677(7)(F)(ii).

⁹⁶ 19 U.S.C. §1677(7)(F)(ii). An affirmative threat determination must be based upon “positive evidence tending to show an intention to increase the levels of importation.” Metallverken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int’l Trade 1990), *citing* American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1280 (Ct. Int’l Trade 1984). *See also* Calabrian Corp. v. United States, 794 F. Supp. 377, 387-88 (Ct. Int’l Trade 1992), *citing* H.R. Rep. No. 1156, 98th Cong., 2d Sess. 174 (1984).

⁹⁷ 19 U.S.C. § 1677(7)(F)(i). Factors I and VII are inapplicable since this investigation does not involve a countervailable subsidy or the importation of agricultural products.

⁹⁸ The statute instructs the Commission to consider the “magnitude of the dumping margin”

(continued...)

of the industry and conditions of competition distinctive to the foundry coke industry.¹⁰⁰ Based on an evaluation of the relevant statutory factors, we find that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of foundry coke from China that are allegedly sold in the United States at less than fair value.

By quantity and value, the volume of subject imports increased during the period of investigation, from 26,647 metric tons valued at \$3.0 million in 1997 to 113,332 metric tons valued at \$12.9 million in 1999.¹⁰¹ More notably, there was a marked increase in the volume of subject imports in the interim periods, with 9,130 metric tons valued at \$1.3 million entering during the first six months of 1999, as compared to 38,980 metric tons valued at \$4.1 million entering during the comparable period in 2000.¹⁰² Subject imports' market share also increased during the period of investigation, from no share in 1997 to 1.3 percent in 1998 and then to 9.0 percent in 1999.¹⁰³ Likewise, subject imports gained market share in interim 2000 relative to interim 1999, with their share increasing from 2.6 percent to 7.0 percent.¹⁰⁴ In terms of value, subject imports' share of the market also increased, albeit at a somewhat slower rate than the volume increase. By value, subject imports represented none of the market in 1997, 1.0 percent in 1998, and 6.7 percent in 1999; for the interim periods, subject imports' market share was 2.3 percent in 1999 and 6.2 percent in 2000.¹⁰⁵ By volume and value, U.S. producers' market share declined inversely to subject imports' share, dropping from essentially 100 percent of volume and value in 1997 to 98.7 percent of volume and 99.0 percent of value in 1998, and then to 91.0 percent of volume and 93.3 percent of value in 1999.¹⁰⁶ For interim 2000, as compared to interim 1999, U.S. producers' market share was 4.4 percentage points lower by quantity and 3.9 percentage points lower by value.¹⁰⁷ We find that the rate of increase in subject import volume, both in absolute terms and as a share of apparent consumption, provides an indication that subject imports are likely to increase significantly in the imminent future.

⁹⁸ (...continued)

in an antidumping proceeding as part of its consideration of the impact of imports. 19 U.S.C. § 1677(7)(C)(iii)(V). In its notice of initiation, Commerce estimated a 226.38 percent antidumping duty margin. 65 Fed. Reg. 61303, 61305 (Oct. 17, 2000).

⁹⁹ Commissioner Bragg notes that she does not ordinarily consider the magnitude of the margin of dumping to be of particular significance in evaluating the effects of subject imports on the domestic producers. *See* Separate and Dissenting Views of Commissioner Lynn M. Bragg in Bicycles from China, Inv. No. 731-TA-731 (Final), USITC Pub. 2968 (June 1996).

¹⁰⁰ *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 983 (Fed. Cir. 1994); *NEC Corp. v. Dept. of Commerce and USITC*, 83 F.Supp.2d 1339, 1342-43 (Ct. Int'l Trade 1999); *Calabrian Corp.*, 794 F. Supp. at 387-88.

¹⁰¹ CR and PR at Table IV-1. We note, however, that a large portion of this increase was attributable to imports by or shipments to end users related to U.S. foundry coke producers. *See* CR and PR at Tables IV-1 and IV-2; Questionnaire Responses of *** and ***.

¹⁰² CR and PR at Table IV-1.

¹⁰³ CR and PR at Table IV-3.

¹⁰⁴ CR and PR at Table IV-3.

¹⁰⁵ CR and PR at Table IV-3.

¹⁰⁶ CR and PR at Table IV-3.

¹⁰⁷ CR and PR at Table C-1.

The record on production capacity and capacity utilization in China is very limited in the preliminary phase of this investigation.¹⁰⁸ Indeed, the limited data about the Chinese industry makes it difficult to conclude, under the American Lamb standard, that the evidence for a negative determination is “clear and convincing” and that no relevant contrary evidence will arise in a final determination.¹⁰⁹ The limited data we do have indicate that the Chinese producers have been operating at high capacity utilization rates in 1999 and interim 2000. However, even these limited data indicate that Chinese production capacity is almost double the volume of foundry coke exported from China to the United States in 1999.¹¹⁰ Moreover, the information obtained in the Commission’s recent Section 332 study shows that Chinese producers’ capacity to produce foundry coke exceeds that reported in the preliminary phase of this investigation.¹¹¹ Although respondents have argued that many Chinese production facilities have shut down as a result of recent environmental enforcement requirements,¹¹² the current record lacks information as to whether these facilities have been or will be replaced.¹¹³

A significant and increasing percentage of the reported Chinese production is exported, while Chinese home market shipments have remained steady.¹¹⁴ The reporting Chinese producers increased their shipments to the United States from no exports in 1997 to 15,000 metric tons in 1998 and then to 31,573 metric tons in 1999. The interim data indicate that the volume of exports to the United States are continuing to increase, with 45,296 metric tons entering the United States in interim 2000 as compared to 18,500 metric tons that entered in interim 1999.¹¹⁵ The data currently in the record thus indicate that Chinese foundry coke producers are at least somewhat export oriented, and have focused an increasing percentage of these exports toward the United States market.

In addition, the likelihood of substantially increased imports of the subject merchandise into the United States is further indicated by the existence of antidumping duty remedies issued by third countries. In January 2000, India imposed antidumping duties ranging from \$18.00 to \$25.00 per metric ton on imports of foundry coke from China.¹¹⁶ In June 2000, the European Union, China’s second largest export market for foundry coke, imposed provisional antidumping duties on imports of foundry coke from China, with margins of 45.1 percent.¹¹⁷ We find it likely that the existence of these orders could cause producers in China to divert exports to other markets, including the United States.

The record indicates that foundry coke producers generally do not maintain inventories.¹¹⁸ The limited data provided by Chinese producers show no inventories of the subject merchandise in China.¹¹⁹

¹⁰⁸ See CR at VII-3, PR at VII-3.

¹⁰⁹ See American Lamb, 785 F.2d at 1001.

¹¹⁰ CR and PR at Tables IV-1 and VII-1.

¹¹¹ See Section 332 Report at III-3.

¹¹² Respondents’ Postconference Brief at 43 and Q-14-21. See also Respondents’ letter to staff, dated Oct. 30, 2000.

¹¹³ We intend to explore this question further in any final investigation.

¹¹⁴ CR and PR at Table VII-1.

¹¹⁵ CR and PR at Table VII-1.

¹¹⁶ Petition at Exhibit 7; Petitioners’ Postconference Brief at Exhibit 16; CR at VII-3, PR at VII-2.

¹¹⁷ Petition at 20 and Exhibit 20; Petitioners’ Postconference Brief at Exhibit 15; CR at VII-3, PR at VII-2.

¹¹⁸ CR at II-1, PR at II-1; Petition at 20 and Exhibit 20; Petitioners’ Postconference Brief at Exhibit 15; CR at VII-3, PR at VII-2.

¹¹⁹ CR and PR at Table VII-1.

However, U.S. importers reported substantial but declining end-of-period inventories held in December of 1997, 1998, and 1999, as well as in June 2000.¹²⁰

Although Chinese producers may theoretically be able to switch from production of blast furnace coke to foundry coke, the limited record in the preliminary phase of this investigation does not contain information which indicates that subject producers are in fact able to product shift.¹²¹

In considering whether the subject imports are likely to depress or suppress domestic prices to a significant degree, we note that subject imports undersold the domestic product in all except one comparison over the period examined.¹²² Although there was no significant effect on U.S. producers' prices during most of the period of investigation, U.S. producers' reported prices for the one product examined declined significantly toward the end of the period.¹²³ In addition, several purchasers confirmed allegations of lost sales and revenues that occurred during the latter part of the investigation.¹²⁴ However, the average unit value of shipments of the domestic like product increased slightly over the period of investigation, while the average unit values of the subject imports showed no clear trend.¹²⁵ The apparent underselling instead may reflect quality and substitutability issues that we intend to examine further in any final phase of the investigation. We find that, especially given the apparent recent decline in domestic consumption and the likely significant subject import volume increases, these imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on domestic prices of foundry coke.

We also find that the imports of foundry coke from China are likely to have a significant adverse impact upon the performance of the United States industry. Despite their market share losses from 1997 through 1999, U.S. producers' open market U.S. shipments were unchanged during this period, as apparent domestic consumption rose from 1997 to 1999.¹²⁶ The data indicate, however, that the subject imports captured nearly all of the growth in the U.S. market, thereby depriving the domestic producers of participating in the market expansion. Moreover, the data in the current record suggest that apparent consumption has begun to decline, as reflected in the interim data.¹²⁷ In addition, domestic producers' total U.S. shipments (including open market shipments and internal transfers) declined by 1.3 percent from 1997 to 1999, and were 7.7 percent lower in interim 2000 than they were in interim 2000.¹²⁸ We note, however, that some of the decline reflected a drop in domestic producers' internal transfer shipments.¹²⁹

¹²⁰ CR and PR at Table VII-2. Respondents asserted that these inventory levels reflect their need to build up inventories in order to supply customers in the Midwest and Northern region of the United States when barge traffic shuts down during the winter months. Respondents' Postconference Brief at 49-50; Conference Tr. at 102. We will seek to explore this contention further in any final investigation.

¹²¹ In any final investigation, we may examine further respondents' contention that product shifting toward more foundry coke production for export is unlikely, given the significant supply deficit for blast furnace coke in the United States. Respondents' Postconference Brief 48.

¹²² CR and PR at Table V-1.

¹²³ CR and PR at Table V-1.

¹²⁴ CR and PR at Table V-2; Conference Tr. at 41, 44.

¹²⁵ CR and PR at Tables VI-3 and IV-1.

¹²⁶ CR and PR at Tables IV-2 and IV-3.

¹²⁷ Apparent U.S. consumption was 578,124 metric tons in interim 2000, as compared to 598,125 metric tons in interim 1999. CR and PR at Table IV-2.

¹²⁸ CR and PR at Tables IV-2 and C-1.

¹²⁹ In any final investigation, we intend to examine further the internal transfers.

The subject imports did not have a significant adverse impact on the industry during the period of investigation. The industry remained profitable throughout the period of investigation; however, its operating income -- in absolute terms, on a per-unit basis, and as a percentage of sales -- declined between 1998 and 1999 and showed further declines in a comparison of the interim periods.¹³⁰ At the same time, SG&A expenses also increased, but at a slower rate, and capital expenditures fell.¹³¹ We note that the financial position of several members of the industry was more precarious than that of others. Given the substantial environmental compliance expenses that this industry will be required to expend on an ongoing basis, as well as other high maintenance costs associated with foundry coke production, we find it likely that the declines indicated towards the end of the period of investigation will continue at a significant rate if the industry is forced to continue competing with the increasing volumes of low priced subject imports.

Related to the likely financial impact, we have also examined the statutory criterion concerning the actual and potential negative effects on the existing development and production efforts of the domestic industry.¹³² As indicated above, the domestic producers have been and will continue to be required to make significant capital expenditures to comply with environmental requirements. To the extent that the subject imports may adversely affect the industry's profitability, the subject imports are likely to have a significant adverse impact on the industry's efforts to produce foundry coke in compliance with environmental regulations.

Therefore, based on the record in the preliminary phase of this investigation, we find there is a reasonable indication that the U.S. industry producing foundry coke is threatened with material injury by reason of allegedly LTFV imports of foundry coke from China.

CONCLUSION

For the reasons stated above, we determine that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports of foundry coke from China that are allegedly sold in the United States at less than fair value.

¹³⁰ CR and PR at Tables VI-1 and C-1. Between 1998 and 1999, gross profits fell by 17.4 percent, unit operating income declined by 22.2 percent, and operating margins declined by 4.1 percentage points. In interim 2000, as compared to interim 1999, gross profits were lower by an additional 18.2 percent, unit operating income declined by an additional 20.8 percent, and operating margins declined by an additional 3.2 percentage points.

¹³¹ CR and PR at Tables VI-1 and C-1.

¹³² 19 U.S.C. § 1677(7)(F)(I)(VIII). The record indicates that the industry is unlikely to be engaged in the development of derivative or more advanced versions of the like product. Therefore, that specific aspect of this threat criterion is not relevant in this investigation.